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No. 10-534

IN THE

Supreme Court of the United States

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,
Petitioner,

v.

ZEV LAGSTEIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ROLLINS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae Rollins, Inc. (hereinafter Rollins) is a premier North American consumer and commercial services company. Rollins provides essential pest control services and protection against termite

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation of submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

damage, rodents and insects to over two million (2,000,000) customers in the United States, Canada, Mexico, Europe, Central America, the Caribbean, the Middle East, Asia and the Mediterranean. The company operates in over 500 locations around the globe.

Rollins provides these services through wholly owned subsidiaries, including:

1. Orkin, LLC;
2. HomeTeam Pest Defense;
3. Western Pest Services;
4. PCO Services;
5. The Industrial Fumigant Company;
6. Waltham Services; and
7. Crane Pest Control.

Rollins prides itself on its ethical, cost-effective work. As part of that commitment to honesty and integrity, Rollins provides many of its customers with a streamlined means of dispute resolution through contractual arbitration.

The Mediation/Arbitration provision used by Rollins' subsidiary, Orkin, in its residential agreements provides that arbitration shall be administered under the rules of the American Arbitration Association ("AAA"). Its arbitrations are also subject to the Federal Arbitration Act. *Amicus* has a vital interest in the enforcement of its arbitration agreements as written, and in the integrity of the arbitration process.

Contractual arbitration avoids the expense and delays of litigation; allows the parties to craft, through the use of precise contractual terms, the

scope and focus of the dispute resolution mechanism to ensure efficient resolution of contractual disputes; and provides a means for customer service corporations and their customers to resolve disputes in a quick, effective, dependable and predictable manner.

Consumer and commercial service corporations place great emphasis on arbitration as an alternate dispute resolution technique. In concert with the widespread use of arbitration, these same corporations, and the consumers who purchase goods and services from these corporations, should be able to rely on the arbitration agreement, and should be able to control the scope and focus of the arbitration process. This should include the ability to rely on the specifically agreed-to contractual terms as to the arbitration procedure; the ability to rely on the integrity of the arbitrators; and the ability to confirm that the arbitrators are limited to interpreting the terms of the parties' contract, rather than engaging in wholesale contractual rewrites and expansions of the arbitral scope. If these rights are not protected, it will become impossible to continue to include arbitration agreements in customer service contracts.

Amicus relies on maintaining access to dependable, cost-effective alternate dispute resolution. Because the Ninth Circuit's decision in this case undermines that reasonable reliance, *Amicus* brings its concerns to this Court's attention.

SUMMARY OF ARGUMENT

The continued viability of arbitration as a dispute resolution device is dependent on protecting the integrity of the process. If arbitrators are permitted to play "hide the ball" as to their qualifications, experience, training, or background, then the process

is at risk of inconsistent results, prejudice to one or both parties, and ultimately a fraud on the system, which would nullify the process as an acceptable alternative to traditional litigation. This would result in parties reverting back to litigation as not just the primary dispute resolution tool, but the only dispute resolution alternative.

The Ninth Circuit's ruling below demonstrates an inappropriate policy of abstention in arbitration cases. It is incumbent on this Court to clarify the law so that arbitration results, like the result below which the district court found biased, will not be allowed to stand based on the misguided notion that courts have no role under the FAA to ensure that the arbitral process works fairly and rationally.

ARGUMENT

I. THE CONTINUED VIABILITY OF ARBITRATION AS A DISPUTE RESOLUTION DEVICE IS DEPENDENT ON PROTECTING THE INTEGRITY OF THE PROCESS

The continued viability of arbitration as an efficient cost effective resolution of disputes is wholly dependent on the arbitration process remaining fair and free of subversion and trickery.

The Ninth Circuit's decision will damage *Amicus's* ability to rely on the efficiency and cost-effectiveness of arbitration. By giving the arbitrators unreviewable authority to expand the scope of arbitration hearings beyond that set by the parties' agreement, the Ninth Circuit has made contractual arbitration a far less predictable and dependable means of dispute resolution.

This Court has long held that the parties are in control of the structure of the arbitration: "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). The Ninth Circuit's ruling here contravenes that essential understanding by holding that the arbitrators may disregard the parties' efforts to structure the arbitration as the parties see fit.

If parties to a contract cannot dependably set the scope and structure of their arbitration process, they cannot control costs or ensure an efficient proceeding. The Ninth Circuit's ruling thus appears to be in direct conflict with this Court's statement in *Volt*. By turning a blind eye to what the Ninth Circuit casts as "mistakes" in contractual construction, thereby allowing arbitrators to assess liability against corporations for failing to provide unpurchased services, the Ninth Circuit has abdicated too much authority to arbitrators.

In *Volt*, this Court reaffirmed the rule that, under the FAA, the parties may exclude certain claims from the scope of their arbitration proceedings. 489 U.S. at 478. The Ninth Circuit here acknowledged that the arbitrators ruled on a claim that was outside the scope of the arbitration proceeding, based on an alternate form of coverage that was not a part of the parties' contract, but held that such "mistakes" were within the arbitrators' discretion.

This Court recently explained the difference between misreading a contract and reading new terms and agreements into the contract, and held that arbitrators exceed their power when they read new

terms or agreements into a contract. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1770 (2010). While contract interpretation is a matter for the arbitrators, contract expansion is in excess of arbitral powers. *See Id.*, at 1773-1774.

Under the Ninth Circuit's rule, an arbitrator can hold companies liable for a failure to provide unpurchased services, and even award punitive damages for a failure to provide unpurchased services—which is precisely what the arbitrators did in this case—and the courts can do nothing to intervene.

In such situations the parties never intended unpurchased services or unwanted coverages to be a part of their agreement. While the parties may turn to arbitrators to interpret their agreement, they do not give arbitrators the power to expand that agreement in violation of the basic offer-acceptance-consideration triumvirate of contract formation.

The Ninth Circuit's decision cannot be reconciled with this Court's repeated statements that the parties are free to set, by contract, the scope of their arbitration proceedings. Similarly, the Ninth Circuit's decision cannot be reconciled with sound business practices. Companies will not utilize arbitration as an alternative dispute resolution device if they may be held liable for punitive damages for a failure to provide unbargained-for, unpurchased services.

Amicus expects that its relationships with its customers will be governed by the terms of their contract. It is important that the courts be able to intervene where, as in the underlying action here, the

arbitrators rewrite the operative terms of the parties' agreement.

II. THE NINTH CIRCUIT'S RULING TYPIFIES AN INCREASINGLY PREVALENT POLICY OF EXCESSIVE ABSTENTION IN ARBITRATION CASES

This Court recently confirmed that Congress's purpose in enacting the FAA was to replace judicial indisposition to arbitration with a national policy favoring arbitration. *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 581 (2008). Abstention in the face of facts that clearly indicate arbitral bias is contrary to this Court's prior decisions, to the interests of customer service businesses, and indeed to all honest users of contractual arbitration.

This Court has held that arbitrators must "disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968). Nonetheless, the Ninth Circuit's ruling here, which retreats significantly from that instruction, is not an isolated problem. Rather, a number of courts have become less likely to intervene when an arbitrator is shown to have failed to disclose dealings that may rightly suggest a potential for bias. The following present two examples of how courts are misunderstanding their roles in policing arbitral authority.

In *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 337 F.Supp.2d 862 (N.D.Tex.2004), *aff'd as modified*, 436 F.3d 495 (5th Cir.2006), *rev'd*, 476 F.3d 278 (5th Cir. 2006) (*en banc*; 11-5 opinion), *cert. denied*, 127 S.Ct. 2943 (2007), Peter J. Shurn III, an attorney, in undertaking to serve as the sole arbitrator of a major commercial dispute, made repeated false and misleading statements on disclosure forms.

Attorney Shurn was asked on one form: "Have you had any professional or social relationship with counsel for any party in this proceeding or with the firms for which they work?" Shurn falsely insisted several times, and one time under written oath, that he had nothing to disclose. *Id.*, at 879-880. The district court vacated, but the Fifth Circuit, sitting *en banc*, ultimately reversed.

The dissenting judge in the Fifth Circuit's *en banc* reconsideration of *Positive Software* lamented the sacrifice of arbitration integrity to the expediency of arbitral finality. *See Positive Software*, 476 F.3d at 286 (Reavley, J., dissenting). The dissent was blunt: "I dissent because this court may not overrule a decision of the Supreme Court." *Id.* This dissent highlights the shift away from *Commonwealth Coatings* that has taken place in multiple circuits over the intervening years.

As the dissent in *Positive Software* noted, a number of circuits have chosen to disregard *Commonwealth Coatings* by arguing—inaccurately—that the decision does not represent an opinion of the majority of this Court's justices. *See Id.*, at 287; *see also Schmitz v. Zilveti*, 20 F.3d 1043, 1045 (9th Cir. 1994) ("*Commonwealth Coatings* is not a plurality opinion, however.")

Judge Reavley in *Positive Software* explained the danger of focusing on finality over integrity:

> While I can understand the desire to protect the finality of arbitration awards and avoid a return to extended court expense and delay, this does not justify evading the law of the Supreme Court by misstating it or by avoiding it by bleaching the evidence of possible partiality. Nor should we miss the need to promote the impartiality of arbitrators in this time when that is the favored

> method of dispute resolution. Influence can so easily corrupt the decision-making process even when it is not recognized by the magistrate or arbitrator himself. And to prove bias or improper influence is rarely possible. It is imperative that we not allow even the good faith or memory of the potential arbitrator to control the disclosure decision for, as the Justices made clear in *Commonwealth Coatings*, it is the protection and reassurance of the party that matters most.

Positive Software., 476 F.3d at 288 (Reavley, J., dissenting).

Some state courts also believe, mistakenly, that they are powerless to intervene even where the undisclosed information indicates a clear suggestion of bias. In *Haworth v. Superior Court,* 50 Cal.4th 372, 112 Cal.Rptr.3d 853, 235 P.3d 152 (2010), the California Supreme Court was presented with an arbitration award arising out of a female patient's claim that her physician was negligent in performing cosmetic surgery on her lip. The superior court vacated an award in favor of the physician on the ground that the arbitrator failed to disclose a matter that could create a reasonable doubt as to the arbitrator's ability to be impartial under California law. The California Supreme Court disagreed, holding that the arbitrator, a former judge, was not required to disclose that, "10 years earlier, he received a public censure based upon his conduct toward and statements to court employees, which together created 'an overall courtroom environment where discussion of sex and improper ethnic and racial comments were customary.'"

The *Haworth* and *Positive Software* decisions take the opposite course of Justice White's influential con-

currence in *Commonwealth Coatings*. There Justice White explained that the role of "judge of the arbitrator's impartiality" is best played by the parties themselves, "who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business" than are the courts. *Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring). The parties can only play this role if disclosure requirements are enforced. *Id.*

The dissent in *Haworth* echoed Justice White's analysis. The dissent disputed the majority's reasoning "that plaintiff's medical negligence and battery claims do not present the type of dispute in which gender stereotypes and biases are likely to play a part." *Haworth*, 50 Cal.4th at 398 (Werdegar, J., dissenting). Rather, the parties, not the courts, should make that determination, and can do so only by enforcing disclosure requirements. *Id.*, at 395. Justice Werdegar emphasized that "the arbitration system must have—and must be seen to have—sufficient integrity that parties can be confident they will receive a fair hearing and an impartial decision from the arbitrator." *Id.* A female litigant's concern that she could not receive a fair hearing on a cosmetic surgery dispute from a judge who had been censured "for making repeated, overt and demeaning sexual comments in chambers to his female staff members" is reasonable. *Id.* "In condoning the failure of disclosure here, the majority sacrifices system integrity on the altar of arbitral finality." *Id.*

Justice White in *Commonwealth Coatings*, Justice Werdegar of the California Supreme Court in *Haworth* and Judge Reavley in *Positive Software* find common footing in the notion that the parties should

have the right to judge the qualifications of their prospective arbitrators for themselves. Disqualification need not automatically follow disclosure—so long as the arbitrators disclose relevant dealings, the parties may choose to proceed knowing that all cards have been laid on the table. *See Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring).

In *Commonwealth Coatings*, this Court set the standard at the disclosure level of a potential for bias. 393 U.S. at 148-150. Complaints filed by a state Commission on Judicial Discipline alleging judicial misconduct and corruption leading to a non-prosecution agreement to leave the bench and never again serve in a judicial capacity is a "dealing" that should be disclosed. It is simply not credible to assert that a party can have no qualms about the integrity and fairness of such a person serving as arbitrator.

Justice White cautioned in his *Commonwealth Coatings* concurrence: "the judiciary must [not] overlook outright chicanery in giving effect to [arbitration] awards; that would be an abdication of our responsibility." 393 U.S. at 150.

The Ninth Circuit has abdicated its responsibility to enforce disclosure obligations. The expediency of arbitral finality has been elevated too far above the need to ensure the integrity of the process. As a result, it is now harder to obtain fair and unbiased arbitral proceedings and results. No business can rely on such an easily manipulated system to resolve disputes—particularly where the decisions are virtually unreviewable.

The parties can only be assured that their arbitration process has a minimum of integrity if prospective arbitrators disclose dealings that might, if undisclosed, cause a party to reasonably question

their integrity, impartiality or independence. The petitioner is correct, the circuits are in disarray, and this Court's intervention is necessary to ensure the continued integrity of the arbitration process.

Judicial abstention in such circumstances is contrary to this Court's instruction. Similarly, abstention in the face of apparent corruption is contrary to this Court's repeated insistence that arbitrators must go about their tasks honestly. *See Hall St.*, 522 U.S. at 585-586; *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("decisions procured by the parties through fraud or through the arbitrator's dishonesty need not be enforced"); *Commonwealth Coatings*, 393 U.S. at 150 ("We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another").

The troublesome aspect of both *Positive Software* and *Haworth* is that, as with the Ninth Circuit's decision here, those cases illustrate a pervasive problem where a number of courts have failed to appreciate that they have the kind of responsibility that Justice White underscored to make sure that the arbitral process is being conducted with integrity from initial selection of arbitrators to issuance of the final award. Unless this Court takes affirmative steps to prevent these types of abuses, reviewing courts throughout the land will continue to blindly allow arbitrator misconduct to flourish.

In the case at bar, the arbitrator selected and paid by the respondent failed to disclose that he was forced off the Nevada bench amidst charges of cor

ruption. That arbitrator then arranged for one of his longtime defenders to serve as the third arbitrator. Neither arbitrator disclosed those ties, let alone that the ties related to charges of corruption. The two arbitrators then ruled in every regard in favor of the party that arranged for their service. After the arbitration award was issued, the first arbitrator billed and received over Seventy-five Thousand Dollars ($75,000.00) from the prevailing party. *See* Ninth Cir. Docket No. 55

The Ninth Circuit is quick to point out that petitioner, in its due diligence, could have uncovered these facts. Even if this is so, the parties should not be forced to conduct detailed background investigations of all potential arbitrators, and the intentional cover-up of salient facts should not be rewarded. Arbitrators sit in the chairs of the judiciary as quasi-jurists, and should be held to a higher standard than, "if you snooze, you lose."

There is significant evidence that the awards in this case were not the product of honest deliberation. Indeed, the district court found that the awards exhibit bias, not just an appearance of bias, but actual bias. If the parties can be blind-sided by bias that may result in unsuitable or even corrupt arbitrators crafting irrational decisions that support undisclosed predeterminations and the courts refuse to intervene, the future of arbitration as an alternate dispute resolution option is bleak.

Corporations, in the face of this judicial reticence to correct faulty disclosures by arbitrators or aberrant arbitration decisions, will revert back to the relative safety and predictability of litigation, with its avenues of appeal. While traditional litigation may have its own pitfalls, businesses will become willing

to accept them when the alternative is to face the potential for rogue arbitral decisions that leave a company with no recourse.

Arbitration has long served the purposes of the customer service industry to provide to its customers a means to resolve disputes without the added cost and time commitment of litigation. If the decision of the Ninth Circuit is allowed to stand, arbitration will begin to pose too many risks, with too few rewards, to remain a viable choice for customer service firms. It is up to this Court to save arbitration by eschewing excessive judicial abstention and reestablishing some ground rules for arbitral integrity and procedural predictability through judicial oversight under the FAA.

The integrity of the arbitration process will be severely undermined if arbitrators are free to subvert the process by secreting salient facts related to their fitness to sit as arbitrators on the hopes that no party will uncover these facts prior to choosing to employ them as an arbitrator. The decision of the Ninth Circuit serves as an invitation to those with unsavory backgrounds to offer services for which they will be well paid by the parties, in the hopes that either a background check will not be performed, or will not ferret out the otherwise unacceptable behavior.

The appearance of impropriety of a sitting judge would not be tolerated. Similar conduct by one who sits as a "quasi-jurist" should also not be tolerated or protected. The benefits of policing the system to ensure that arbitration remains a process free of guile and obfuscation far outweigh the burdens of, once having discovered a deception on the part of an arbitrator, having to re-arbitrate the matter. Just as the integrity of the judicial system would not

permit such conduct on the part of a judge, neither should quasi-judicial proceedings be a haven for this patently improper behavior.

CONCLUSION

For the reasons stated herein, and in the petition, *amicus* requests that this Court grant the petition for writ of certiorari filed by Certain Underwriters at Lloyd's, London.

Respectfully submitted,

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